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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

Westvaco Corporation,
Packaging Corporation of America, and
Georgia-Pacific Corporation,
Petitioners

v.

Adams Extract Company, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

Motion and Brief for Olson Farms, Inc.
as *Amicus Curiae*.

Harold G. Christensen
Michael R. Carlston
Robert H. Henderson
700 Continental Bank Bldg.
Salt Lake City, Utah 84101

Craig S. Cook
of counsel
3645 East 3100 South
Salt Lake City, Utah 84109

Attorneys for Olson Farms,
Inc.

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Motion for Leave to File *Amicus* Brief.

Olson Farms has requested permission to file its *Amicus Curiae* brief from counsel representing the parties to this litigation. Counsel for Petitioners Westvaco Corp., Packaging Corp. of America and Georgia-Pacific Corp. and counsel for Respondents-Defendants Weyerhaeuser Company and Williamette Industries have all given consent to filing an *Amicus Curiae* brief. Counsel for the remaining Respondents-Defendants and counsel for Respondents-Plaintiffs have declined consent.

Olson Farms, Inc., a Delaware corporation, respectfully moves this Court for leave to file an *Amicus* brief in

support of petitioners' position that contribution should be allowed under the antitrust laws.

Olson Farms has a substantial interest in the outcome of the controversy now before this Court. At the present time Olson Farms is the appellent in two separate suits awaiting rehearing *en banc* before the Tenth Circuit Court of Appeals which involve the question of contribution under the antitrust laws.

The manner in which the question concerning contributions arose is markedly different in the Tenth Circuit cases than in the case before this Court. It is important that this Court be informed of the procedural difference in the Tenth Circuit cases before this Court considers the possible formulation of an antitrust contribution rule of law which may be applicable to all controversies.

The first case, *Olson Farms, Inc., vs. Safeway Stores, Inc., et al.*, No. 77-2068, arose from a 1971 action (Cackling Acres case) in which certain Utah egg producers filed a suit against Olson Farms under the antitrust laws alleging that Olson Farms conspired with other companies to pay producers less for their eggs than they otherwise would have received. Even though most of the plaintiff-producers did not sell to Olson Farms, they nevertheless sought recovery solely against Olson Farms and declined to name the other co-conspirators as defendants.

At trial, the undisputed evidence was that Olson Farms purchased only approximately 11 percent of the eggs for which damages were claimed. The other identified conspirators purchased nearly all of the remaining 89 percent of the eggs. A jury verdict was returned against Olson Farms and it ultimately satisfied a judgment of nearly $2,500,000 — an amount approximately 10 times its market share.

No settlement was made between plaintiff and any of the other co-conspirators in that action. The matter was appealed to the Tenth Circuit Court of Appeals which

affirmed the lower court judgment. *Cackling Acres vs. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Olson Farms initiated Civil No. 77-2068 in 1975 by filing a Complaint against all of the companies identified by the plaintiff-producers in their successful action as co-conspirators. Thus, No. 77-2068 was an independent lawsuit commenced after termination of the plaintiffs' case. The defendants were successful in persuading the district court to dismiss the case on the ground that the antitrust laws did not permit contribution.

On appeal, a divided 2-1 panel of the Tenth Circuit Court of Appeals affirmed the lower court's dismissal. The majority opinion, written by a judge of the United States Court of Customs and Patent Appeals, held that a defendant in an antitrust action may not obtain contribution from others, in most circumstances, but suggested that contribution may be permitted in very limited circumstances. The Honorable William J. Holloway, Jr., dissented from the portion of the majority opinion denying a right to seek contribution, saying that the sounder result, consistent with equitable principles, would be to permit contribution among joint tortfeasors in antitrust actions.

Olson Farms petitioned for a rehearing and suggested rehearing *en banc*. Its petition was granted on December 27, 1979, and hearing in the case is scheduled for September 15, 1980.

The second suit now before the Tenth Circuit Court of Appeals is No. 78-1773. This case originated in 1975 when the successful plaintiffs-producers in the 1971 action filed a second lawsuit against Olson Farms and all the other principal co-conspirators except for Safeway Stores, Inc. This time plaintiffs sought damages from the date of the first complaint until the jury verdict was returned in March of 1974. Olson Farms crossclaimed against each of the co-defendants, and filed a third-party complaint against Safeway Stores, Inc.

On December 19, 1977, the district court, relying upon its decision in No. 77-2068, dismissed the crossclaims and third-party complaint. In its opinion, the district court stated: "There is no readily discernable distinction between the earlier claims for contribution and indemnity and the present one."

Although not contained in the court record, at oral argument Olson Farms stated that it and all other defendants had settled with the plaintiffs. The crossclaims and third-party claims, however, were not settled. The Tenth Circuit Court of Appeals panel in a 2 to 1 decision found no distinction between this case and No. 77-2068 and further found that since a settlement had occurred the determination of liability among the various co-conspirators would require further proceedings and involve obvious complexities which would require Congressional guidelines as to how such matters should be resolved.

The dissenting opinion filed by Judge Holloway stated that since the settlements were not in the record it was improper for the court to judge the possible merits of claims without any determination as to the liability of the parties. Judge Holloway incorporated his previous dissent in No. 77-2068 that contribution should be allowed in antitrust cases.

Olson Farms petitioned for rehearing and suggested rehearing *en banc* which was also granted on December 27, 1979. This case is also scheduled for argument on September 15, 1980.

The present controversy now before this Court concerns dismissal of the crossclaims and affirmative defenses of petitioners against the settling defendants. The two Olson Farms cases, however, illustrate completely separate procedural distinctions. In the first case, Olson Farms sued its co-conspirators after the termination of

plaintiffs' original suit by the means of an independent action. In the second case, Olson not only filed crossclaims as in the present case, but also filed a third-party complaint against an unnamed co-conspirator. In addition, the plaintiffs settled their dispute with all named defendants whereas in the instant case only some of the defendants have settled with the plaintiffs.

Olson Farms believes that the above procedural distinctions are important since they illustrate concrete factual circumstances in which contribution claims can arise. Since the facts in the present case do not encompass the above areas, it is unlikely that such factual circumstances will be considered by the parties before this Court. This Court should be informed of these distinctions, however, in order to make a comprehensive study of the ramifications of adoption of a rule permitting or prohibiting contribution.

In the alternative, Olson Farms wishes to argue its *amicus* position that, should this Court resolve the contribution issue based solely upon the facts in the instant case, this Court should not preclude the question of contribution in the procedural context now pending before the Tenth Circuit Court of Appeals. In such a case, this Court should await petition by the parties to the Olson Farms litigation to determine the contribution question in a context markedly different from that now before this Court.

Finally, Olson Farms moves this Court for permission to file an *amicus* brief since it believes that its experience during the last nine years of antitrust litigation may prove informative to this Court in formulating its decision as to the merits of antitrust contribution. Olson Farms believes that it can materially assist the Court in its disposition of the case in that Olson Farms' input

would be helpful in resolving the important question now pending.

Respectfully submitted this 27th day of August, 1980.

Harold G. Christensen
Michael R. Carlston
Robert H. Henderson
Craig S. Cook
of counsel

Attorneys for Olson Farms, Inc.

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INTEREST OF *AMICUS CURIAE*

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At trial, the undisputed evidence was that Olson Farms purchased only approximately 11 percent of the eggs for which damages were claimed. The other identified conspirators purchased nearly all of the remaining 89 percent of the eggs. A jury verdict was returned against Olson Farms and it ultimately satisfied a judgment of nearly $2,500,000 — an amount approximately 10 times its market share.

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Finally, Olson Farms believes that its experience during the last nine years of antitrust litigation may prove informative to this Court in formulating its decision as to the merits of antitrust contribution.

ARGUMENT

There is little dispute among the authorities or the parties to this lawsuit that federal common law controls the question of whether contribution is allowable in antitrust cases. As stated by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 699 (1978):

> Congress,. . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. Legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.

While arguments have been raised that the contribution question is a legislative matter, the 8th Circuit Court of Appeals in *Professional Beauty Supply v. National Beauty Supply,* 594 F.2d 1179 (8th Cir. 1979), countered this argument by stating:

> We initially note that antitrust statutes are not purported to be comprehensive and, possibly as a result, courts have not been prone to await Congressional action to resolve many of the questions left unanswered by the statute, such as the nature of the cause of action, apportionment of judgments, assignments, survival and limitations. We further observe that there is a dirth of case law on this issue and comment that a complicated legal issue which is raised so infrequently is unlikely to spur immediate Congressional action. Finally, we find further support for our position from the fact that federal courts have been willing to formulate rules for contribution in other areas of the law without express Congressional direction. (See cases cited therein.) *Id.* at 1184-1185.

In addition to those cases cited in *Professional Beauty Supply, supra,* the Third Circuit Court of Appeals in *Glus et al vs. the G. C. Murphy Company, et al.,* 23 FEP Cases 86

(3rd Cir. filed June 27, 1980) held that contribution was permissible under Title VII of the Civil Rights Act of 1964, even though the statute itself did not give such a right.

Amicus Olson Farms also concurs in the views of Petitioner as expressed in its Reply Brief in Support of its Petition for Certiorari that the pendency of Senate Bill 1468 should not be considered by this Court in its decision. (Petitioner's Reply Brief, pp. 7-8).

Assuming, therefore, that this Court should determine the question of contribution in antitrust cases as a matter of federal common law, there are four principal reasons that justify contribution in antitrust cases: (1) fairness, equity and fundamental antitrust policy dictate that contribution be allowed; (2) the deterrent effect of the antitrust laws would be enhanced by contribution; (3) the complexity of antitrust litigation will not be significantly increased by contribution; and (4) contribution will not interfere with orderly settlement of antitrust litigation. *See e.g.*, Note, 93 *Harvard Law Review* 1540 (1980).

Amicus Olson Farms will address each of these factors in light of general statutory and judicial law and relate each fact to the specific problem *Amicus* Olson Farms has encountered in its litigation.

POINT I

CONTRIBUTION IS IMPORTANT TO THE FAIR AND EQUITABLE ENFORCEMENT OF THE ANTITRUST LAWS AND PROMOTION OF COMPETITION.

The unfairness of a rule against contribution is a primary reason for its alteration. "[T]here is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are

responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrong-doers." *Professional Beauty Supply, Inc., v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979).

The first Olson Farms case dramatically illustrates this statement. Olson Farms purchaed eggs from only three of the 14 plaintiffs, and only purchased 11 percent of the total eggs sold by the plaintiffs. Most of the remaining 89 percent of the eggs were purchased by the defendants named by Olson Farms in No. 77-2068, *Olson Farms, Inc., v. Safeway Stores, Inc.*, 1979-2 Trade Cas. Para. 62,995 (10th Cir. 1979).

Evidence at the *Cackling Acres* trial showed the number of eggs purchased and the damages claimed by the plaintiffs as to each egg buyer as follows:

Egg Buyer	Dozens Purchased	Damages Claimed
Safeway Stores	6,297,888	$271,129
Egg Products Co.	4,497,222	197,618
Countryside Eggs & Gusto Marketing	2,724,824	119,961
Snow White Egg Co.	3,574,070	157,052
Olson Farms	2,288,650	99,656

Thus, although the damages claimed as to Olson Farms was only approximately $100,000, and even trebled was only approximately $300,000, because of the lack of contribution, Olson Farms was forced to satisfy a judgment of nearly $2,500,000.

The plaintiff chose to sue Olson Farms alone because of its solvency and because the plaintiffs had ceased selling eggs to Olson Farms. It was explained by one of the plaintiffs at the *Cackling Acres* trial that Olson Farms was sued, and other purchasers of eggs were not, because suing the other distributors would have disrupted the ongoing business relationship between them. The following colloquy occurred between *amicus'* counsel and a plaintiff.

Q. You didn't sue Countryside in this case?
A. No, sir.
Q. Why not?
A. For the simple reason that we were doing business with them, and they was taking our eggs. And it's pretty hard when you have 1,200 cases on the market to be dropped.

(Cross-examination of Bud Jones Shepherd by H. Christensen, January 29, 1974, official transcript of *Cackling Acres*, pp. 4632, 4633.)

The present status of the law that a single defendant may be obligated to answer for the practice of an entire industry is not only inequitable, but is also economically unwise. Assuming that all defendants in an antitrust conspiracy are equally accountable, the law places an unequal burden upon the defendants and, in fact, many times allows a co-conspirator to escape all liability even when the co-conspirators were the moving force behind the conspiracy. The co-conspirator, therefore, is allowed to go "scot free" because of the "whim or spite" of the plaintiff. *Professional Beauty Supply, supra,* 504 F.2d at 1185.

Judge Holloway was concerned about the lack of fairness of a rule against contribution as applied to the facts in the Olson Farms case. In his dissenting opinion he stated:

> *It does not seem to me that an antitrust defendant found guilty of a violation should be rejected as a lost soul with no claim on the conscience of the court.* The result of imposing the entire treble damage liability on one defendant while denying him any right to seek contribution from others jointly involved with him in the wrong, is too extreme for me. In this instance the damages claimed against Olson Farms, as the majority opinion states, were $99,656 and, trebled, the alleged liability would have amounted to $298,968. Yet the averment is that Olson satisfied a judgment, plus costs, interest and attorneys' fees, by paying the

> plaintiffs in the 1971 suit the sum of $2,405,580. (slip opinion, page 5.) (Emphasis added.)

Even again assuming that a defendant in an antitrust action is guilty of prohibited conduct, this fact should not permit unjust enrichment by both the plaintiff and the other co-conspirators. As noted in *Glus v. G. C. Murphy Company, supra,* regarding contribution under the Civil Rights Act, the court stated:

> The contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. See Note, "Settlement in Joint Tort Cases," 18 *Stan. L. Rev.* 486, 490 (1966).

Likewise, Judge Holloway in his dissent noted that the allegations of Olson Farms made a compelling claim for recovery to avoid unjust enrichment of the other defendants on the theory that the damages paid by Olson Farms for the other defendants were directly related to the benefit those defendants received by purchasing eggs at the unlawfully depressed prices. (Slip opinion, p. 5-6). The effect of which is, of course, to weaken rather than strengthen competition because all conspirators have not been required to restore their improper gains.

The overall effect of this type of unjust enrichment is extremely anti-competitive particularly in integrated industries like the egg industry where competitors of plaintiffs at one level may be driven out of business if they are selectively named sole defendants in a suit involving their activity at a completely separate level of industry.

The Fifth Circuit Court of Appeals in *Wilson P. Abraham Construction Corporation v. Texas Industries, Inc.,* 604 F.2d (5th Cir. 1979), recognized that an inequity may result when all antitrust violators were not treated equally. *Id.* at 905-906.

Furthermore, it should not matter when a claim for contribution arises, whether at the time litigation is commenced or after an unsuccessful attempt to defend an antitrust claim. The principles of fairness and equity require that all parties be treated the same. The objective of the antitrust laws can be well served only when this occurs.

For these reasons, the equity and fairness of the judicial system and the fundamental policy of the antitrust laws in promoting competition require contribution to be allowable in antitrust litigation.

POINT II

ALLOWING CONTRIBUTION WOULD INCREASE RATHER THAN DECREASE THE DETERRENT EFFECT OF THE ANTITRUST LAWS.

Opponents of contribution argue that the possibility of imposition of sole liability for an industry-wide practice has an enhanced deterrent effect on any potential violator of antitrust laws. The chance that a participant may be faced with a full judgment is thought to be more likely to discourage anticompetitive conduct than would ensuring that each participant pays only a share. *Wilson P. Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897, 901 (5th Cir. 1979); *Sabre Shipping Corporation v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969). This argument, when considered against the backdrop of a concrete situation such as Olson Farms No. 79-2068, does not have merit. It makes little sense to say that punishing one competitor by making it pay 10 times more than its market share and then trebling it, while allowing a competing conspirator with a larger market share to retain the full benefit of its illegal conduct, results in a strong deterrence to members of an industry.

Furthermore, the validity of any argument regarding deterence must account for the motivating forces behind business decisions. Businessmen that are unaware they are potentially liable for their co-conspirator's damages cannot be deterred by a rule against contribution.

It is submitted by *amicus* Olson Farms that allowing contribution would not adversely impact the deterrent policy of the antitrust laws. First, it is as likely that informed businessmen are as willing to take a chance of going "scot free" and escape all liability as they are fearful of being liable for other co-conspirators' damages.

Second, as noted previously, many businessmen make their decisions completely unaware of the consequences of the co-conspirator laws. Usually it is not the top management of a company which violates the antitrust laws, but rather it is the middle level manager. As stated by one commentator:

> It is often the middle level managers, whose goals differ from those of top management, who make decisions that lead to antitrust violations. These managers seek their own advancement within the company and find an advancement tied to their ability to produce profits. They therefore may feel considerable pressure to undertake anti-competitive activity such as price fixing to maintain or increase profits. An increase in profits, albeit through an antitrust violation, would benefit the career advancement goal of middle level managers. The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the facts of violation. Under such circumstances allowing contribution would best deter antitrust violations, where it would increase the probability that the company will be held liable for those violations and hence increase the frequency of company sanctions against overzealous employees. Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1545-46 (1980) (footnotes omitted).

The correctness of the above statement was illustrated by *Cackling Acres,* in that the violations both proven and alleged occurred because of the actions of the Utah lower level managers and were not attributable to decisions from the corporate headquarters in California.

Third, treble damages themselves are a significant penalty even for a company's proportionate share attributable to participation in a price-fixing conspiracy. Plaintiffs tend to sue every defendent they can reach; and as one scholar noted, "Since damages are trebled, there is quite a sufficient quantum of liability to punish '[all wrongdoers] by forcing them to share the liability.' " Dobbs, *Remedies,* Section 10.7 at 704 (1973).

In addition to the trebling of damages as a deterrent, there are numerous state and federal criminal actions which may be brought against an antitrust violator and which are a part of the panoply of deterrent actions which can be used to deal with such violators. Two noted authors conclude that the most effective deterrent is prison sentences for corporate executives involved in antitrust violations. *See Baker and Reeves,* "The Paper Label Sentences: A Critique," 76 *Yale Law Journal* 621 (1977).

Fourth, the fact that contribution is allowable increases the probability that any co-conspirator will be discovered. Professor Corbett made this observation when he stated:

> [N]ot only would the existence of a right of contribution remove to a great extent the possibility of escaping liability entirely, making it less attractive for smaller companies particularly to join in any concerted violation, but it would in a sense add *vigor to the enforcement of the antitrust laws* by allowing the conspirators themselves to ensure that all those participating in the unlawful action are appropriately penalized. Corbett, "Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Rev.* 111, 137 (1962) (Emphasis added.)

Finally, there is a severe danger of overkill in the case of price fixing where "intent" is in fact not a prerequisite to civil awards and where a rational punishment may deter legitimate activity that is close to the line and threatens small companies at the expense of the large. Similarly, unjustified settlements force smaller companies to reduce the funds available for increased productivity in competing both nationally and internationally. Indeed, failure to remedy the current situation may contribute to the conglomerate merger movement. Antitrust Equal Enforcement Act of 1979: "Committee Report on Contribution in Antitrust Cases," p. 18, 96 Cong. 1st Sess. (1979).

The preceding arguments relate to intentional as well as unintentional violators of the antitrust laws. Given the fact that aggressive businessmen may intend to take actions lawful in themselves, but when combined with other intentional acts may also form the basis for an inference that the businessman intended a violation of the antitrust laws, it is not appropriate to consider a distinction on contribution based upon whether the conduct was intentional or unintentional.

The actions taken by Olson Farms found to be in violations of antitrust laws were performed by middle level managers, unaware of the law of conspiracy and the lack of contribution. The evidence clearly established that Olson Farms, in fact, entered a market in which a conspiracy had already been established. Just as in numerous cases, therefore, the legal effect of allowing or disallowing contribution would have had no consequences as to the actions taken by Olson Farms employees.

The lack of contribution, however, has now made these passive actions an extreme punishment even more than Congress intended through the treble damage provision of the antitrust laws. Olson Farms has been forced to pay nearly 10 times its share in the first case and, in the second case, to settle with the plaintiffs even though Olson Farms disclaimed liability and even though no

liability has been established. Certainly, under these conditions it cannot be said that allowing contribution would in any way affect the deterrent objectives of the antitrust laws.

POINT III.

ALLOWING CONTRIBUTION WOULD NOT SIGNIFICANTLY INCREASE THE COMPLEXITY OF ANTITRUST LAWSUITS.

The Fifth Circuit Court of Appeals in rejecting contribution voiced the argument that allowance of third-party claims may open a Pandora's Box of procedural problems. *Wilson Abraham Const, supra.* 604 F.2d 906. These arguments claiming a resulting increased complexity of federal antitrust lawsuits and the inability of plaintiffs to control their lawsuits are without merit.

Under Rule 42(b) of the Federal Rules of Civil Procedure trial judges are empowered to organize a lawsuit to serve the purposes of efficiency as defined by the equities. Separated claims and parties need not confuse or complicate a trial. *See Ford Motor Company v. Mulby,* 210 F.2d 137, 139 (4th Cir. 1954). Moreover, under Rule 54(b) the original plaintiff can obtain a final judgment on his claims even if separate claims for contributions are still pending.

A claim for contribution is not against a plaintiff but is against the other defendants. As stated by one commentator:

> The plaintiff need face no more issues than it might have faced against the original defendant, since intervenors or interpleaded third-party defendants should only raise the same defenses as the original defendants. Note, "Contribution in Private Antitrust Actions," 91 *Harvard L. Rev.* 1540, 1549 (1980).

Since it is a frequently employed tactic for an antitrust plaintiff to join as many defendants as may reasonably be expected to be liable, with a view to insuring full recovery, it is difficult to see how (the plaintiffs' burden) would be increased by permitting contribution. Corbett, "Apportionment of Damages in Contribution Among Co-conspirators in Antitrust Treble Damage Actions," 31 *Fordham Law Review* 111 (1963). This principle can easily be seen in the first Olson Farms case in which the claim for contribution was made after the plaintiffs' case had been finally adjudicated. In such lawsuits it is unlikely that the plaintiff would have any role whatsoever in determining the apportionment of the damages previously obtained.

Even as to those cases such as the instant one in which some defendants have settled or in which unnamed co-conspirators have settled, the determination of apportionment of damage awards either pro tanto, pro rata or by excluding a settling defendant's conduct from further litigation generally would introduce no new factual dispute into a case. These methods would not require the plaintiff to contest the settler's liability in order to preserve its award.

In the second Olson Farms case, for example, had three to four of the defendants elected to settle with the plaintiff these companies would no longer be parties to the court action but their share of the market and their actions would still remain facts to be proven by the plaintiff. Any judgment awarded could easily be apportioned among the various remaining and settling defendants based solely upon the evidence adduced at trial, with no increase in the burden in which the plaintiff would have had to carry.

For these reasons, any additional complexity in federal antitrust litigation would be minuscule when weighed against the serious inequity which now exists without the right of contribution.

POINT IV.

ALLOWING CONTRIBUTION IN ANTITRUST CASES WOULD NOT SERIOUSLY AFFECT THE SETTLEMENT OF SUCH CASES.

Attorneys for plaintiffs are concerned that contribution would seriously affect their ability to settle antitrust litigation. There is no doubt that the desire of defendants to settle would be curtailed with the allowance of contribution. However, the reason for the slowdown in settlement is simply that defendants could no longer be coerced and intimidated into settling because of their fear that continued presence in the lawsuit would result in enormous liability based upon industry-wide practice.

As stated by the committee report in the hearings for Senate Bill 1468:

> Plaintiffs' lawyers have testified that S.1468 will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of S.1468 would simply be to lessen the coercive nature of some of plaintiff's lawyers's negotiations, and that the only settlement S.1468 will discourage in the long run are those it is intended to discourage — namely, coerced settlements.
>
> In the earlier discussion the committee noted that as a matter of policy, it is necessary to balance the desire to terminate antitrust cases in as rapid a manner as possible with the rights of the defendants to utilize the courts to assert their innocence. Since the courts were established to resolve disputes, the parties should not be denied the opportunity to present their substantive case because of fear of liability for damages caused by others who have settled. Committee Report, *supra,* page 19.

Moreover, settlement generally should occur regardless of a contribution rule if both sides have the same

estimates of the probability that the defendant will be held liable, since they could avoid litigation costs and uncertainty by settling.

The allowance of contribution would eliminate the inequities as stated in Petitioner's Petition for Certiorari in which the amount each defendant must pay for settlement dramatically increases as each new settlement has been made. Contribution, as noted previously, also allows the innocent party to litigate to prove his innocence without the risk of assuming liability for all the damages caused by the actual wrongdoers.

Amicus Olson Farms believes that the right of contribution should be available to all defendants — both those who have unintentionally violated the law as well as those who intentionally acted. Moreover, defendants should be allowed to assert contribution during the plaintiffs' trial or in a subsequent action. Finally, *Amicus* believes that a rule apportioning damages based upon the percentage of the items forming the basis for the claim is the most equitable method.

In a proper case a court should be able to fashion a rule of contribution which will protect the rights of settling defendants. *Professional Beauty Supply, supra,* 594 F.2d at 1184. There have been numerous proposals made as to the manner in which apportionment of damages should be made in a contribution case involving the various types of defendants. These proposals including that of the Eighth Circuit, Senate Bill 1468, the American Bar Association and others are well-stated in Note, "Contribution in Private Antitrust Actions," 93 *Harvard Law Review* 1540, 1555-1561 (1980).

If this Court allows contribution in antitrust cases this Court must also formulate a formula to be applied in the various types of cases. *Amicus* Olson Farms again respectfully requests that this rule be formulated to include the situations occurring in the two Olson Farms cases or that such a rule be reserved until the proper case is before

this Court involving these types of situations.

In any event, however, any rule formulated by this Court in allowing contributions can only affirmatively support rational and equitable settlements which would no longer be subject to the abuses evidenced in the cases cited.

CONCLUSION.

Allowance of contribution in federal antitrust cases under federal common law is a significant step forward in the development of a fair and equitable procedure to simultaneously enforce the antitrust laws while at the same time respecting the rights of the offending parties. Since the manner in which contribution may arise is varied, this Court should formulate a rule designed to cover all such situations or should specifically narrow its opinion to the facts of the case at bar.

For the reasons asserted by *Amicus* Olson Farms in this brief, it is respectfully urged that this Court should reverse the Fifth Circuit Court of Appeals and permit contribution in federal antitrust cases.

Respectfully submitted this 27th day of August, 1980.

Harold G. Christensen
Michael R. Carlston
Robert H. Henderson
Craig S. Cook
Of Counsel

Attorneys for Olson Farms, Inc.